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No. 04-1324

In the Supreme Court of the United States

PATRICK DAY, PETITIONER

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the State forfeits a defense under the statute of limitations governing habeas corpus petitions when it fails to plead or otherwise raise that defense, but instead mistakenly concedes that the petition was timely.

2. Whether, after a State has filed an answer to a habeas petition, Rule 4 of the Rules Governing Section 2254 Cases permits a district court to dismiss the petition *sua sponte* based on a ground not raised in the answer.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
I. A district court may dismiss an untimely habeas petition *sua sponte*, even if the State fails to raise the defense in its answer 7
A. Congress has assigned a unique gatekeeper function to federal district courts in habeas cases 7
B. The courts' gatekeeper role justifies judicial initiative in enforcing the limitations period placed on habeas petitions even when the State fails to raise or erroneously concedes the limitations issue ... 11
II. Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure do not defeat the district court's authority to raise a habeas petition's untimeliness *sua sponte* 15
A. The courts borrow Civil Rules in habeas cases only to the extent that such application is consistent with the overall framework and policies of habeas corpus 16
B. Applying Civil Rules 8(c) and 12(b) to bar district courts from giving effect to limitations on habeas review would be inconsistent with habeas principles 19
III. Allowing the district court to raise the statute of limitations *sua sponte*, even after an answer has been filed, does not conflict with general practice under the Federal Rules of Civil Procedure 25

Table of Contents—Continued: Page

IV. A district court should *sua sponte* dismiss a habeas petition as untimely absent actual prejudice or waste of judicial resources 28
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Acosta v. *Artuz*, 221 F.3d 117 (2d Cir. 2000) 8, 9, 11
Ali v. *Higgs*, 892 F.2d 438 (5th Cir. 1990) 27
Arcadia v. *Ohio Power Co.*, 498 U.S. 73 (1990) 26
Arizona v. *California*, 530 U.S. 392, supplemented, 531 U.S. 1 (2000)) 14
Banks v. *Dretke*, 540 U.S. 668 (2004) 20, 21
Blonder-Tongue Labs., Inc. v. *University of Ill. Found.*, 402 U.S. 313 (1971) 26
Boyd v. *Thompson*, 147 F.3d 1124 (9th Cir.1998) 13
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 8
Brewer v. *Marshall*, 119 F.3d 993 (1st Cir. 1997), cert. denied, 522 U.S. 1151 (1998) 13
Burgin v. *Broglin*, 900 F.2d 990 (7th Cir. 1990) 13
Calderon v. *Thompson*, 523 U.S. 538 (1998) 8, 9
Carlisle v. *United States*, 517 U.S. 416 (1996) 28
Caspari v. *Bohlen*, 510 U.S. 383 (1994) 21, 22
Castro v. *United States*, 540 U.S. 375 (2003) 28
Clay v. *United States*, 537 U.S. 522 (2003) 2
Coates v. *Byrd*, 211 F.3d 1225 (11th Cir. 2000), cert. denied, 531 U.S. 1166 (2001) 2

Cases—Continued: Page

Collins v. *Youngblood*, 497 U.S. 37 (1990) 20, 21, 29
Commander Oil Corp. v. *Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir.), cert. denied, 531 U.S. 979 (2000) 26
Davis v. *Bryan*, 810 F.2d 42 (2d Cir. 1987) 28
Day v. *Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012 (11th Cir. 1997), cert. denied, 523 U.S. 1119 (1998) 5
Day v. *State*, 746 So. 2d 1219 (Fla. Dist. Ct. App. 1999) 2
Duncan v. *Walker*, 533 U.S. 167 (2001) 7
Eberhart v. *United States*, 126 S. Ct. 403 (2005) 25
Esslinger v. *Davis*, 44 F.3d 1515 (11th Cir. 1995) 13
Felker v. *Turpin*, 518 U.S. 651 (1996) 10
Femia v. *United States*, 47 F.3d 519 (2d Cir. 1995) 13
Foman v. *Davis*, 371 U.S. 178 (1962) 26
Gonzales v. *Crosby*, 125 S. Ct. 2641 (2005) 18
Granberry v. *Greer*, 481 U.S. 129 (1987) ... 12, 20, 21, 22, 23
Grand Rapids Plastics, Inc. v. *Lakian*, 188 F.3d 401 (6th Cir. 1999), cert. denied, 529 U.S. 1037 (2000) 27
Gray v. *Netherland*, 518 U.S. 152 (1996) 20
Hardiman v. *Reynolds*, 971 F.2d 500 (10th Cir. 1992) 10, 13
Harris v. *Nelson*, 394 U.S. 286 (1969) 16, 19
Haskell v. *Washington Township*, 864 F.2d 1266 (6th Cir. 1988) 28, 29
Herbst v. *Cook*, 260 F.3d 1039 (9th Cir. 2001) 11
Hill v. *Braxton*, 277 F.3d 701 (4th Cir. 2002) 11

Cases—Continued: Page

Jackson v. *Secretary for the Dep't of Corrs.*, 292 F.3d 1347 (11th Cir. 2002) 5, 13
Jenkins v. *Anderson*, 447 U.S. 231 (1980) 20, 21
Kamen v. *Kemper Fin. Servs.*, 500 U.S. 90 (1991) 26
King v. *Kemna*, 266 F.3d 816 (8th Cir. 2001), cert. denied, 535 U.S. 934 (2002) 12
Kiser v. *Johnson*, 163 F.3d 326 (5th Cir. 1999) 10, 11, 15
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 6, 21, 29
Lonchar v. *Thomas*, 517 U.S. 314 (1996) 18
Long v. *Wilson*, 393 F.3d 390 (3d Cir. 2004) 11, 13
Lorraine v. *Coyle*, 291 F.3d 416 (6th Cir.), opinion corrected on denial of reh'g, 307 F.3d 459 (2002), cert. denied, 538 U.S. 947 (2003) 12
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 12
Magouirk v. *Phillips*, 144 F.3d 348 (5th Cir. 1998) 13
Mayle v. *Felix*, 125 S. Ct. 2562 (2005) 7, 8, 16, 30
McCleskey v. *Zant*, 499 U.S. 467 (1991) 8
McMillan v. *Jarvis*, 332 F.3d 244 (4th Cir. 2003) 14
Moore v. *McDonald*, 30 F.3d 616 (5th Cir. 1994) 27
Mowbray v. *Cameron County*, 274 F.3d 269 (5th Cir. 2001), cert. denied, 535 U.S. 1035 (2002) 27
Nardi v. *Stewart*, 354 F.3d 1134 (9th Cir. 2004) 11
Nyland v. *Moore*, 216 F.3d 1264 (11th Cir. 2000) 3
O'Brien v. *Moore*, 395 F.3d 499 (4th Cir. 2005) 16
O'Neal v. *McAninch*, 513 U.S. 432 (1995) 19
Phelps v. *McClellan*, 30 F.3d 658 (6th Cir. 1994) 27

Cases—Continued: Page

Pliler v. *Ford*, 542 U.S. 225 (2004) 15
Rhines v. *Weber*, 125 S. Ct. 1528 (2005) 7
Robinson v. *Johnson*, 313 F.3d 128 (3d Cir. 2002), cert. denied, 540 U.S. 826 (2003) 9
Rodriguez v. *Johnson*, 104 F.3d 694 (5th Cir.), cert. denied, 520 U.S. 1267 (1997) 13
Salahuddin v. *Jones*, 992 F.2d 447 (2d Cir.), cert. denied, 510 U.S. 992 (1993) 27
Schiro v. *Farley*, 510 U.S. 222 (1994) 20, 21, 23
Schlanger v. *Seamans*, 401 U.S. 487 (1971) 19
Scott v. *Collins*, 286 F.3d 923 (6th Cir. 2002) 11
Slack v. *McDaniel*, 529 U.S. 473 (2000) 18
Smith v. *Murray*, 477 U.S. 527 (1986) 8
Stewart v. *Martinez-Villareal*, 523 U.S. 637 (1998) 10
Stone v. *Powell*, 428 U.S. 465 (1976) 7
Street v. *Vose*, 936 F.2d 38 (1st Cir. 1991), cert. denied, 502 U.S. 1063 (1992) 27
Sweger v. *Chesney*, 294 F.3d 506 (3d Cir. 2002), cert. denied, 538 U.S. 1002 (2003) 12
Teague v. *Lane*, 489 U.S. 288 (1989) 8
Trest v. *Cain*, 522 U.S. 87 (1997) 13, 20, 21
United States v. *Barrett*, 178 F.3d 34 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000) 13
United States v. *Bendolph*, 409 F.3d 155 (3d Cir. 2005), petition for cert. pending, No. 05-3 (filed June 24, 2005) 2, 11, 13, 14, 27, 28
United States v. *Frady*, 456 U.S. 167 (1982) 8, 9, 17, 24

Cases—Continued: Page

United States v. *Ishmael*, 343 F.3d 741 (5th Cir. 2003), cert. denied, 540 U.S. 1204 (2004) 13
United States v. *Kubrick*, 444 U.S. 111 (1979) 9
United States v. *Sosa*, 364 F.3d 507 (4th Cir. 2004) 11
United States v. *Vonn*, 535 U.S. 55 (2002) 24
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 8
Washington v. *James*, 996 F.2d 1442 (2d Cir. 1993), cert. denied, 510 U.S. 1078 (1994) 13
Williams v. *Lampe*, 399 F.3d 867 (7th Cir. 2005) 26
Williams v. *Taylor*, 529 U.S. 420 (2000) 8
Woodford v. *Garceau*, 538 U.S. 202 (2003) 8, 18
Yeatts v. *Angelone*, 166 F.3d 255 (4th Cir.), cert. denied, 526 U.S. 1095 (1999) 12
Zotos v. *Lindbergh Sch. Dist.*, 121 F.3d 658 (6th Cir. 1994) 27

Statutes and rules:

Act of July 8, 1976, Pub. L. No. 94-349, § 2, 90 Stat. 822 9
Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334 9
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
§ 101, 110 Stat. 1217 2
§ 104, 110 Stat. 1218 23
28 U.S.C. 1391(e) 19
28 U.S.C. 1915(d) (1988) 27
28 U.S.C. 2243 ..... 10, 19, 25

Statutes and rules—Continued: Page

Para. 7 27
Para. 8 23
28 U.S.C. 2244 4
28 U.S.C. 2244(b)(3)(A) 10, 13
28 U.S.C. 2244(d) 2, 4
28 U.S.C. 2244(d)(1) 1, 2, 7
28 U.S.C. 2244(d)(1)(A) 2
28 U.S.C. 2244(d)(2) 2
28 U.S.C. 2254 (1982) 6, 9, 10, 24
Rule 2(c) 18
Rule 4 ..... *passim*
Rule 4 (976) 9
Rule 5 22
Rule 5(b) 22
Rule 9(a) 18
Rule 11 ..... 15, 16, 17, 19
28 U.S.C. 2254 (1976):
Rule 4 ..... 9, 10, 16, 17
Rule 5 22
Rule 11 ..... 19, 25
28 U.S.C. 2254(b)(3) 23
28 U.S.C. 2255 ..... 1, 9, 10, 17, 24, 25, 29
Para. 1 24
Para. 6 ..... 1, 7
Rule 1 (1976) 24
Rule 4(b) 1, 9, 10
Rule 5 24

Rules—Continued: Page

Rule 12 (1976) 17

Fed. R. Civ. P.:

Rule 6(a) 3

Rule 8 22

Rule 8(c) ..... *passim*

Rule 11(h) 24

Rule 12 22

Rule 12(b) 15, 16, 19, 20, 22, 24, 25, 30

Rule 15(a) 26, 27, 30

Rule 15(c)(2) 18

Rule 33 ..... 19, 22, 25

Rule 35 25

Rule 41(b) 12

Rule 60(b) 25

Rule 81(a)(2) 15

Fed. R. Crim. P. 29(c) 28

Miscellaneous:

H.R. Rep. No. 23, 104th Cong., 1st Sess. (1995) 24

S. Rep. No. 1526, 80th Cong., 2d Sess. (1948) 24

2 James W. Moore, *Moore's Federal Practice* (3d ed. 2005) 26, 27

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INTEREST OF THE UNITED STATES

This case presents the question whether a district court has the power *sua sponte* to dismiss a habeas petition as untimely, when the State has erroneously conceded in its response that the petition was timely. Because the one-year time limit for a state prisoner to file a habeas petition is the same as the period within which a federal prisoner must file a motion for postconviction relief, see 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255 para. 6, and in light of similarities between the relevant procedural rules governing collateral review of state and federal convictions, compare Rule 4 of the Rules Governing Section 2254 Cases (Section 2254 Rules) with Rule 4(b) of the Rules Governing Section 2255 Proceedings (Section 2255 Rules), the Court's decision in this case will influence, if not

control, the resolution of cases presenting similar questions under 28 U.S.C. 2255. See, *e.g.*, *United States* v. *Bendolph*, 409 F.3d 155 (3d Cir. 2005) (en banc), petition for cert. pending, No. 05-3 (filed June 24, 2005). The United States therefore has a significant interest in this case.

STATEMENT

1. In 1998, following a jury trial in a Florida state court, petitioner Patrick Day was convicted of second-degree murder and sentenced to imprisonment for a term of 55 years. J.A. 1, 10. Day appealed only his sentence, and the Florida First District Court of Appeals affirmed on December 21, 1999. *Day* v. *State*, 746 So. 2d 1219. Because Day did not seek review in this Court, the one-year limitations period for filing a federal habeas petition, established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 101, 110 Stat. 1217 (28 U.S.C. 2244(d)(1)), began running 90 days after the state court's decision, when the time to file a petition for certiorari expired, *i.e.*, on March 20, 2000. Pet. App. 2a, 9a. See 28 U.S.C. 2244(d)(1)(A); *Clay* v. *United States*, 537 U.S. 522, 532 (2003).

2. On March 9, 2001, Day filed a motion for post-conviction relief in state court, claiming five grounds of ineffective assistance of counsel. J.A. 10-13; Pet. App. 9a. The filing of that state court application tolled Day's one-year period for filing a federal habeas petition, 28 U.S.C. 2244(d)(2), but at that point Day had already used 353 of his 365 days. Pet. App. 2a, 12a. The state trial court denied Day's motion for relief, as well as an amended motion, which the court construed as a second motion. *Id.* at 9a. The state district court of appeals affirmed on October 9, 2002, and, following the denial on November 15, 2002, of Day's motion for rehearing, the court of appeals' mandate issued on December 3, 2002. J.A. 14-16. With that event, pursuant to Eleventh Circuit precedent, Day's unexpired time for filing a fed-

eral habeas petition began to run again. See *Nyland* v. *Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (motion for postconviction relief is pending until Florida court of appeals' mandate issues). Thus, Day had until December 16, 2002 (a Monday), to file a federal habeas petition. Day did not, however, file his federal petition until January 8, 2003, after the limitations period had run. Pet. App. 2a, 9a-10a; J.A. 17-20.

3. Day's petition did not include the information that would be necessary to determine if it was timely. Although the petition reflected the dates on which his conviction was affirmed and his state court motion for postconviction relief was filed, J.A. 18, it did not specify the date on which the court of appeals' mandate issued in the state habeas proceeding. See J.A. 19. Nor were the court documents that would have revealed that information attached to the petition.

On February 4, 2003, a magistrate judge issued an order indicating that the petition was "in proper form" and directing the State to file a response, which was to include all arguments on exhaustion of state remedies or procedural default. J.A. 21-22. The order did not mention the statute of limitations. *Ibid.* In its March 17, 2003, response, Florida stated that the petition "is timely; filed after 352 days of untolled time." J.A. 24. The State attached to its response copies of the relevant state court proceedings, including a copy of the Florida appellate court's December 3, 2002, mandate.

On December 11, 2003, a new magistrate judge to whom Day's petition had been assigned issued an order *sua sponte* directing Day to show cause why his petition should not be dismissed as untimely. J.A. 26-30. The order to show cause explained that, because 353 days had passed between the last day for filing a petition for certiorari on direct appeal and the filing of Day's state postconviction motion, his federal habeas petition was due within twelve days of when the state court of appeals issued its mandate affirming the denial of postconviction relief, *i.e.*, by Monday, December 16, 2002. See J.A. 29 (citing *Nyland* v. *Moore*, *supra*; Fed. R. Civ. P. 6(a)).

In his response to the Order to Show Cause, Day noted that Florida's response had "agreed the Petition was timely" and that the court had waited nearly a year to raise the issue of timeliness. Day then argued that the petition was not untimely because the one-year period for filing a federal petition under Section 2244(d) continued to be tolled for 90 days after the denial of his motion for rehearing in the state collateral appeal, during which time he could have filed a petition for certiorari in this Court. In addition, Day urged that the Section 2244(d) deadline should be further tolled because state public defenders had withheld his trial transcript for 352 days, thereby delaying his ability to file his state collateral attack. J.A. 31-32.

The magistrate judge recommended dismissal of the petition. Pet. App. 8a-15a. The magistrate judge rejected Day's argument that his petition was timely. *Id.* at 12a (citing *Coates* v. *Byrd*, 211 F.3d 1225 (11th Cir. 2000) (90-day period for filing a petition for certiorari from a collateral appeal does not toll the time for filing a federal habeas petition), cert. denied, 531 U.S. 1166 (2001)). The magistrate judge also found that Day's argument that he was denied prompt access to trial transcripts did not justify equitable tolling under 28 U.S.C. 2244. Pet. App. 13a-14a. Day filed an objection to the magistrate's Report and Recommendation with the district court. Day did not renew either of his arguments why his petition was timely. Instead, Day argued for the first time that the State's statement, in its response, that the petition was timely foreclosed a *sua sponte* dismissal by the court on that basis. J.A. 34-36.

The district court adopted the magistrate's report and dismissed Day's petition. Pet. App. 7a. The court also denied a certificate of appealability. J.A. 8. The Eleventh Circuit granted a certificate of appealability to determine whether the district court had erred in addressing the timeliness of the petition after the State had conceded that it was timely. J.A. 37.

4. The court of appeals, in a per curiam opinion, affirmed the district court's dismissal of Day's petition. Pet. App. 1a-6a. The court of appeals first noted that it had, in *Jackson* v. *Secretary for the Department of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002), joined four other courts of appeals in holding that, "even though the statute of limitations is an affirmative defense, the district court may review *sua sponte* the timeliness of the section 2254 petition" under AEDPA. Pet. App. 4a. The court of appeals reasoned that "there is no meaningful difference between an erroneous failure to plead the statute of limitations as an affirmative defense, as occurred in *Jackson*, and a concession of timeliness that was patently erroneous, as occurred here." *Ibid.*[1] The court further explained that, while "[i]n an ordinary civil case, a 'failure to plead the bar of the statute of limitations constitutes a waiver of the defense,'" *ibid.* (quoting *Day* v. *Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997), cert. denied, 523 U.S. 1119 (1998)), habeas petitions are controlled by different considerations. Unlike ordinary civil suits, Rule 4 of the Section 2254 Rules provides, in relevant part, that "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." Thus, the court of appeals concluded, in order to "promote comity, finality, and federalism," Congress had, in AEDPA, assigned federal courts "an obligation

[1] In the district court, the State had not responded to the Order to Show Cause or to Day's objections to the magistrate judge's Report and Recommendation before the court had acted. On appeal, however, the State affirmatively argued that the habeas petition was untimely and that the concession of timeliness in the State's response was due to "a clerical mistake by counsel; that is, the failure to account for the 36 days which passed between conclusion of state court proceedings and the date Day submitted his habeas petition to prison officials." C.A. Appellee Br. 5.

to enforce the federal statute of limitations" on habeas petitions. Pet. App. 5a.[2]

SUMMARY OF ARGUMENT

District courts have authority to give effect to the one-year statute of limitations period Congress has established for federal court review of state court convictions, whether or not a State has overlooked or mistakenly conceded the limitations bar in its answer. It is undisputed that the limitations bar can be vindicated by the district court *sua sponte* before the State has been called upon to respond. But the district court's decision to call for an answer does not strip the court of the authority to give effect *sua sponte* to Congress's determination that federal courts should not hear untimely petitions.

There is nothing in the rules concerning habeas procedure, or, indeed, in the rules governing civil proceedings generally, that divests the district court of its independent authority to abide by the limitations on habeas review. Nor would the importation of such a restriction be sensible. Because habeas petitioners are not required by the Section 2254 Rules to supply the district court at the outset with all of the information necessary to determine whether a petition is timely, the district court will often have to call for a response from the State in order to obtain that information. Once the habeas court does so and becomes aware of the limitations obstacle, sound principles of finality, comity, and federalism require the district court to dismiss the petition, at least ab-

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[2] As petitioner notes (Br. 9 n.9), the Court distinguished in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), between a defendant's "waiver" of a defense, *i.e.*, "the intentional relinquishment or abandonment of a known right," and "forfeiture," which is "the failure to make the timely assertion of a right." *Id.* at 458 n.13 (citation omitted). Although the court of appeals referred to this case as raising a question of "waiver," Pet. App. 4a, petitioner makes no claim that the State knowingly abandoned its statute of limitations defense. Thus, this brief refers to the State's alleged "forfeiture," although many of the sources cited are not always so precise in their terminology.

sent prejudice or other countervailing concerns. Any suggestion that the habeas rules, or borrowed rules of civil procedure, imply an absence of such power is squarely foreclosed by the Court's decisions. Thus, the State's act of filing a response in this case, even one that erroneously conceded that the petition was timely, did not deprive the district court of its authority to enforce the limitations period that Congress has adopted to promote the prompt filing and disposition of habeas corpus petitions.

ARGUMENT

I. A DISTRICT COURT MAY DISMISS AN UNTIMELY HABEAS PETITION *SUA SPONTE*, EVEN IF THE STATE FAILS TO RAISE THE DEFENSE IN ITS ANSWER

In order "to advance the finality of criminal convictions," Congress has "adopted a tight time line, a one-year limitation period" for federal habeas cases. *Mayle* v. *Felix*, 125 S. Ct. 2562, 2573 (2005); 28 U.S.C. 2244(d)(1); 28 U.S.C. 2255 para. 6. AEDPA's one-year limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments"; it "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001); *Rhines* v. *Weber*, 125 S. Ct. 1528, 1534 (2005). To further that policy, district courts may dismiss untimely habeas petitions *sua sponte*, even when the State has erroneously conceded the timeliness of the petition.

A. Congress Has Assigned A Unique Gatekeeper Function To Federal District Courts In Habeas Cases

This Court has long recognized the important principles of comity, federalism, and finality that are implicated by federal habeas review of state court judgments. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). In light of "the pro-

found societal costs that attend the exercise of habeas jurisdiction," *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)), the Court has "impose[d] significant limits on the discretion of federal courts to grant habeas relief," *id.* at 554-555. It has, for example, restricted the courts' ability to grant habeas relief on the basis of procedurally defaulted claims, *United States* v. *Frady*, 456 U.S. 152, 164-169 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72, 90-91 (1977), retroactive application of "new rules," *Teague* v. *Lane*, 489 U.S. 288, 308-310 (1989) (plurality opinion), non-prejudicial claims of trial error, *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993), or where the petitioner has abused the writ, *McCleskey* v. *Zant*, 499 U.S. 467, 487 (1991).

Congress's purposes in enacting AEDPA were "to further the principles of comity, finality, and federalism" that gave rise to this Court's own limitations on habeas relief. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). See *Mayle*, 125 S. Ct. at 2573-2574. In particular, Congress understood that collateral review of state convictions undermines the finality that "is essential to both the retributive and the deterrent functions of criminal law," *Calderon*, 523 U.S. at 555, a concern that applies to postconviction review of federal as well as state convictions, *Frady*, 456 U.S. at 164-165. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (noting that one of AEDPA's purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases").

Like the other limits on habeas review, AEDPA's statute of limitations "implicates values beyond the concerns of the parties." *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000). The habeas limitations period "promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Ibid.*

See *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting that limitations periods "protect defendants *and* the courts") (emphasis added); *Robinson* v. *Johnson*, 313 F.3d 128, 137 (3d Cir. 2002) (habeas time limit protects against "wasting precious legal and judicial resources"), cert. denied, 540 U.S. 826 (2003).

Because the costs associated with federal habeas review are "societal costs," *Calderon*, 523 U.S. at 554, society's interests in enforcing the judicially and congressionally imposed limits on such review "transcend the concerns of the parties to [the] action." *Acosta*, 221 F.3d at 122 (citation omitted). As such, the habeas rules have provided, since their adoption by Congress in 1976, for the courts to exercise a unique gatekeeper function.[3] Unlike most civil litigation, in habeas cases Congress assigned to district courts the responsibility to dismiss unmeritorious petitions, including on grounds of untimeliness, even before the government has filed a responsive pleading. Rule 4 of the Section 2254 Rules (1976).

Rule 4 explicitly provides that the district court "must promptly examine" the petition and "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition." Rule 4 of the Section 2254 Rules. Only if the petition is not dismissed *sua sponte* under this provision does the district court "order the respondent to file an answer, motion, or other response." *Ibid.* Rule 4(b) of the Section 2255 Rules similarly establishes that the district court is to perform an initial screening function and dismiss a motion that, on its face, does not entitle the movant to relief. Indeed, as the terms of Rule 4 make clear, the district court is not only *authorized* to dismiss a habeas petition for any apparent reason that would foreclose relief, it is *required* to do so. See

[3] Congress initially delayed implementation of the proposed rules for proceedings under Sections 2254 and 2255. See Pub. L. No. 94-349, § 2, 90 Stat. 822. By statute, Congress subsequently "approved" the proposed rules, with certain amendments. Pub. L. No. 94-426, § 1, 90 Stat. 1334.

Rule 4 of the Section 2254 Rules (directing that the district court "*must* promptly examine" the petition and "*must* dismiss" it if "the petitioner is not entitled to relief") (emphasis added). See also Rule 4(b), Section 2255 Rules (same). The Advisory Committee Notes confirm that intent, noting that under 28 U.S.C. 2243 "it is the *duty* of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Rule 4 of the Section 2254 Rules, Advisory Committee Notes (1976) (emphasis added); 28 U.S.C. 2243 (directing district court to issue an order to show cause to the respondent "unless it appears from the application that the * * * person detained is not entitled" to relief).

Rule 4 thus clearly contemplates summary dismissal of a Section 2254 petition or Section 2255 motion by a district court on any fatal ground, even if the ground is one that, in an ordinary civil case, generally must be asserted by the opposing party. "Congress intended the courts to play a more active role in [habeas] cases than they generally play in many other kinds of cases." *Hardiman* v. *Reynolds*, 971 F.2d 500, 504 (10th Cir. 1992). And Rule 4, in particular, "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999).[4]

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[4] The judicial responsibility established in Rule 4 is just one example of the gatekeeper function the courts serve with respect to habeas petitions. "In AEDPA, Congress established a 'gatekeeping' mechanism for the consideration of 'second or successive habeas corpus applications' in the federal courts." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996)). Thus, "[b]efore a second or successive application [for a writ of habeas corpus] is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A).

B. The Courts' Gatekeeper Role Justifies Judicial Initiative In Enforcing The Limitations Period Placed On Habeas Petitions Even When The State Fails To Raise Or Erroneously Concedes The Limitations Issue

As the court of appeals observed, Pet. App. 4a, the circuit courts that have addressed the issue have uniformly concluded that Rule 4 authorizes a district court *sua sponte* to dismiss a habeas petition, without requiring any answer from the government, if the court can determine from the face of the petition and accompanying documents that it is out of time, as long as the court gives the petitioner notice and an opportunity to be heard. See *ibid.*; *Long* v. *Wilson*, 393 F.3d 390, 402-403 (3d Cir. 2004); *Hill* v. *Braxton*, 277 F.3d 701, 706 (4th Cir. 2002); *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002); *Herbst* v. *Cook*, 260 F.3d 1039, 1042-1043 & n.3 (9th Cir. 2001); *Acosta*, 221 F.3d at 124; *Kiser*, 163 F.3d at 328-329. See also *United States* v. *Bendolph*, 409 F.3d 155, 164 (3d Cir. 2005) (en banc), petition for cert. pending, No. 05-3 (filed June 24, 2005) (Section 2255 case); *United States* v. *Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (same).[5] Indeed, petitioner concedes (Br. 42) that "[b]efore an answer is filed, Habeas Rule 4 allows courts to dismiss untimely petitions summarily."

The power of a habeas court to act *sua sponte* does not vanish once the State files a response. Although petitioner states (Br. 28) that "the Habeas Rules prohibit post-answer *sua sponte* dismissals," there is nothing in Rule 4 or any other rule that expressly precludes a court from doing so. Nor, contrary to petitioner's contention (Br. 29), does Rule 4's express grant of authority *sua sponte* to dismiss defective petitions pre-answer prohibit, by "negative implication," post-answer court-initiated dismissals. This Court rejected a simi-

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[5] While recognizing a district court's authority under Rule 4 to raise a petition's untimeliness *sua sponte*, the Sixth and Ninth Circuits have held that the district court loses that authority once the State has filed an answer. See *Scott*, 286 F.3d at 930; *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004).

lar inference in *Link* v. *Wabash Railroad*, 370 U.S. 626 (1962). There, the petitioner argued that Federal Rule of Civil Procedure 41(b)'s grant to the district court of authority to dismiss a complaint on a defendant's motion for failure to prosecute, "by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute *except* upon motion by the defendant." *Id.* at 630. The Court rejected that argument, holding that "[n]either the permissive language of the Rule * * * nor its policy requires us to conclude that it * * * abrogate[s] the power of courts, acting on their own initiative" to dismiss a dilatory plaintiff's complaint. *Ibid.* Petitioner advances the same argument here, and it fares no better.

As in *Link*, the courts' express authority under Rule 4 to dismiss an unmeritorious habeas petition *sua sponte* is not a unique exception to some general prohibition or an authorization of a judicial power that would otherwise be absent. Rather, it is a specific exhortation to exercise a more general authority to screen out and dismiss procedurally defective habeas petitions that exists even in the absence of specific authorization in a statute or rule. This Court has recognized the distinctive role the judiciary plays in enforcing limitations on habeas relief, even where doctrines of forfeiture might preclude their enforcement in private civil litigation. In *Granberry* v. *Greer*, 481 U.S. 129 (1987), for example, the Court held that a court of appeals has the power to dismiss a habeas petition for failure of the petitioner to exhaust state remedies even though the State failed to raise nonexhaustion in the district court. *Id.* at 134. Applying *Granberry*, at least eleven courts of appeals have held that a federal court in a habeas proceeding may similarly raise a petitioner's procedural default *sua sponte*, even if the respondent fails to do so.[6]

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[6] See *Sweger* v. *Chesney*, 294 F.3d 506, 520-521 (3d Cir. 2002), cert. denied, 538 U.S. 1002 (2003); *Lorraine* v. *Coyle*, 291 F.3d 416, 425-426 (6th Cir.), amended on denial of reh'g, 307 F.3d 459 (2002), cert. denied, 538 U.S. 947 (2003); *King* v. *Kemna*, 266 F.3d 816, 822 (8th Cir. 2001) (en banc), cert. denied, 535 U.S. 934 (2002); *Yeatts* v. *Angelone*, 166 F.3d 255, 261-262 (4th Cir.), cert.

The policy underlying that rule—that habeas courts have an independent role in promoting finality and reducing federal-state friction by avoiding habeas litigation that is precluded by a plain procedural bar—equally applies to a district court that has ordered a response by the State under Rule 4 and that thereafter notices a statute of limitations obstacle that the State itself overlooked.[7]

The courts' well-established gatekeeper role in habeas cases justifies the district court's exercise of authority to consider AEDPA's statute of limitations *sua sponte*, even when the State has filed an answer that fails to address the issue or that makes an erroneous concession of timeliness. See Pet. App. 4a-5a; *Jackson* v. *Secretary for the Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam); *Long*, 393 F.3d at 401-404; *Bendolph*, 409 F.3d at 164 (same with respect to Section 2255 postconviction motion). As discussed, habeas limitations, including the statute of limitations, further

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denied, 526 U.S. 1095 (1999); *Boyd* v. *Thompson*, 147 F.3d 1124, 1127-1128 (9th Cir. 1998); *Magouirk* v. *Phillips*, 144 F.3d 348, 357 (5th Cir. 1998); *Brewer* v. *Marshall*, 119 F.3d 993, 999 (1st Cir. 1997), cert. denied, 522 U.S. 1151 (1998); *Esslinger* v. *Davis*, 44 F.3d 1515, 1524-1525 (11th Cir. 1995); *Washington* v. *James*, 996 F.2d 1442, 1448 (2d Cir. 1993), cert. denied, 510 U.S. 1078 (1994); *Hardiman*, 971 F.2d at 501-505; *Burgin* v. *Broglin*, 900 F.2d 990, 997-998 (7th Cir. 1990); see *Trest* v. *Cain*, 522 U.S. 87, 90 (1997) (reserving the issue). Cf. *United States* v. *Ishmael*, 343 F.3d 741, 743 (5th Cir. 2003) (court of appeals could apply the limitations on postconviction review established in *Powell* and *Teague* despite government's failure to raise those limitations in district court), cert. denied, 540 U.S. 1204 (2004).

[7] Similarly, even before Congress's statutory assignment to the courts of a gatekeeper function with respect to second and successive petitions, 28 U.S.C. 2244(b)(3)(A), the courts had enforced the limitation on abusive writs by denying such petitions *sua sponte*. See *Rodriguez* v. *Johnson*, 104 F.3d 694, 697 n.1 (5th Cir.) (citing pre-AEDPA cases), cert. denied, 520 U.S. 1267 (1997); *Femia*, 47 F.3d at 523. See *United States* v. *Barrett*, 178 F.3d 34, 44 (1st Cir. 1999) ("The core of AEDPA restrictions on second or successive § 2255 petitions is related to the longstanding judicial and statutory restrictions * * * known as the 'abuse of the writ' doctrine."), cert. denied, 528 U.S. 1176 (2000).

broader societal interests in comity, federalism, and finality that transcend the interests of the parties themselves. As the Third Circuit explained:

> The spectrum of interests that we identify * * * —finality and judicial efficiency, most notably, but also the public interest and the public reputation of judicial proceedings—are just as ably advanced post-answer as pre-answer when an untimely case is dismissed upon a district court's own motion. Recognition of this disentangles the overriding federal, judicial, and societal interests that are relevant to our analysis from those that concern the parties alone. * * * The above considerations * * * are no less persuasive in instances where the government has either waived the limitations defense or so concedes. Not only are habeas cases different, but, as for the AEDPA limitations provision, the government can claim no monopoly on its use.

409 F.3d at 167.

The district court's authority to raise AEDPA's statute of limitations *sua sponte* does not, contrary to petitioner's protestations (Br. 36-37), "offend[]" the adversarial system. As discussed below, see pp. 25-28, *infra*, courts can, in certain circumstances, raise issues that the parties themselves have not, even in traditional civil litigation. That is especially appropriate where, as in the habeas context, "[t]here are broader interests at stake * * * than only those belonging to the parties." *McMillan* v. *Jarvis*, 332 F.3d 244, 248 (4th Cir. 2003). See *Arizona* v. *California*, 530 U.S. 392, 412 (noting propriety of court raising *res judicata* defense *sua sponte* because the doctrine is "not based solely on the defendant's interest," but also "the avoidance of unnecessary judicial waste") (citation omitted), supplemented by 531 U.S. 1 (2000). Rule 4 itself makes clear Congress's understanding that "broader interests [are] at stake" in habeas litigation, and

petitioner's "adversary system" argument (Br. 36) cannot be squared with the district court's conceded authority (see *id.* at 42) to grant *sua sponte* dismissals under that Rule. That is particularly true because, as this Court has noted, it will frequently be the case that the timeliness of a habeas petition will not be ascertainable until after the State has filed, along with its answer, copies of documents from the state court proceedings. See *Pliler* v. *Ford*, 542 U.S. 225, 232 (2004).[8]

II. RULES 8(c) AND 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT DEFEAT THE DISTRICT COURT'S AUTHORITY TO RAISE A HABEAS PETITION'S UNTIMELINESS *SUA SPONTE*

Petitioner bases his argument that the district court lacked authority to raise his petition's untimeliness on the characterization of habeas proceedings as "civil" in nature and on the claim that the Court should import into habeas procedure an assertedly strict rule under Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure that a defendant forfeits any affirmative defenses not raised in its answer. See Pet. Br. 10-11. Petitioner maintains that under Rule 81(a)(2) of the Federal Rules of Civil Procedure "the Civil Rules apply to matters of procedure not *directly* addressed by a habeas statute or rule," Pet. Br. 20 (emphasis added), and that Rule 11 of the Section 2254 Rules "compels" the courts to follow the Federal Rules of Civil Procedure "where the [Habeas Rules] are silent on an issue," Pet. Br. 20 n.25 (quoting *Kiser*, 163 F.3d at 328). Petitioner misunderstands the relationship of the Civil Rules to habeas proceedings to that extent.

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[8] Petitioner now contends (Br. 45-50) that his habeas petition was timely filed, and that the Court should for that reason as well hold that the district court erred in dismissing his petition. The United States takes no position on the question whether petitioner's habeas petition was, in fact, untimely. The question on which the Court granted certiorari assumes that the petition was untimely under AEDPA's statute of limitations, and this brief proceeds on that assumption.

The Federal Rules of Civil Procedure do not apply to habeas review if such application would be inconsistent with the distinctive role of the courts in enforcing limits on habeas review. Thus, if it were correct, as petitioner argues, that *sua sponte* enforcement of the AEDPA statute of limitations would be inconsistent with the Civil Rules, the consequence would not be to defeat the district court's authority to enforce the AEDPA statute of limitations, but rather to render Civil Rules 8(c) and 12(b) inapplicable to habeas proceedings.

A. The Courts Borrow Civil Rules In Habeas Cases Only To The Extent That Such Application Is Consistent With The Overall Framework And Policies Of Habeas Corpus

It is a considerable oversimplification to claim that habeas review is just like any other civil case. As this Court has observed, labeling habeas corpus proceedings as civil "is gross and inexact," since "[h]abeas corpus practice in the federal courts has conformed to civil practice only in a general sense." *Harris* v. *Nelson*, 394 U.S. 286, 293-294 (1969). "Essentially," the Court has noted, "the proceeding is unique." *Id.* at 294. While a habeas case is nominally civil, the proceeding "reviews a criminal punishment with the potential of overturning it," so that it "necessarily assumes part of the underlying case's criminal nature." *O'Brien* v. *Moore*, 395 F.3d 499, 505 (4th Cir. 2005).

Consistent with the unique character of habeas proceedings, the courts are far less constrained to follow the ordinary Civil Rules than petitioner suggests. Although Rule 11 of the Section 2254 Rules "*permits* application of the Federal Rules of Civil Procedure in habeas cases," *Mayle*, 125 S. Ct. at 2569 (emphasis added), it does so only "to the extent that [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules," *ibid.* (quoting Rule 11). Similarly, the Advisory Committee Notes stress that the Civil Rules are to be borrowed only "when in its discretion the court decides they are appropriate." Rule 11 of the Section 2254 Rules,

Advisory Committee Notes (1976). The Notes further emphasize that "[t]he court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus." *Ibid.* (Rule 11 "permits application of the civil rules only when it would be appropriate to do so").

The Section 2255 Rules, applicable to federal post-conviction motions, make even more clear the extent of discretion the courts possess to determine the appropriate procedural rule to apply. As originally adopted by Congress, Rule 12 provided that "[i]f no procedure is specifically prescribed by these rules, *the district court may proceed in any lawful manner not inconsistent with these rules*, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure." Rule 12 of the Section 2255 Rules (1976) (emphasis added).[9] Cf. *Frady*, 456 U.S. at 166-167 n.15 (interpreting Rule 12 of the Section 2255 Rules with reference to Rule 11 of the Section 2254 Rules).

In addition to its permissive language, the Advisory Committee Notes to Rule 11 are significant because they direct that courts should depart from the Civil Rules not only when those rules are inconsistent with a specific habeas rule or statutory provision, but also when they are "inconsistent or inequitable in the *overall framework of habeas corpus*." Rule 11 of the Section 2254 Rules, Advisory Committee Notes (1976) (emphasis added). This Court has embraced that admonition, see *Mayle*, 125 S. Ct. at 2569 (quoting "overall framework" language from Advisory Committee Notes); *Frady*, 456 U.S. at 168 n.15 (same), an understanding that is fundamentally inconsistent with petitioner's proposed analytical approach (Br. 20-21), pursuant to which the courts must presumptively apply the most analogous Federal Rule of Civil

[9] Although the language of Rule 12 was amended in 2004, after the district court's decision in this case, "the[] changes are intended to be stylistic and no substantive change is intended." Rule 12 of the Section 2255 Rules, Advisory Committee Notes (2004).

Procedure unless doing so would be inconsistent with a particular statutory provision or habeas rule.

In *Mayle*, for example, the Court did not set a standard of positive conflict between Federal Rule of Civil Procedure 15(c)(2)—regarding relation back of amendments to a complaint—and Rule 2(c) of the Section 2254 Rules or the AEDPA statute of limitations. Rather, the Court upheld limited application of Rule 15(c)(2) to habeas proceedings in a manner consistent with habeas principles, such as "AEDPA's 'finality' and 'federalism' concerns." *Mayle*, 125 S. Ct. at 2574. See *id.* at 2570 (noting that the majority of the courts of appeals had construed Rule 15(c)(2) "in federal habeas cases less broadly" in light of "Congress' decision to expedite collateral attacks by placing stringent time restrictions on [them]") (citation omitted).

In other situations, likewise, the Court has held certain civil rules inapplicable, or applicable in a modified fashion, in light of general habeas principles, rather than in reference solely to a particular rule or statute. See *Harris*, 394 U.S. at 293, 296 (Fed. R. Civ. P. 33, regarding discovery in civil actions, did not apply to habeas proceedings in light of "the history of habeas corpus procedure" and because civil discovery rules "are ill-suited to the special problems and character of such proceedings"); *O'Neal* v. *McAninch*, 513 U.S. 432, 440 (1995) (applying a criminal harmless-error standard in a habeas proceeding, because, "although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake"); *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n.4 (1971) (noting that national service of process, which is authorized in "civil actions" against federal officials under 28 U.S.C. 1391(e), is not authorized in a habeas proceeding, even though the statute does not explicitly exclude habeas proceedings).[10]

[10] Neither *Slack* v. *McDaniel*, 529 U.S. 473, 489 (2000), which petitioner cites (Br. 9) for the proposition that the Federal Rules of Civil Procedure are "applicable as a general matter to habeas cases," nor *Woodford* v. *Garceau*, 538 U.S. 202 (2003) (cited at Pet. Br. 20), is to the contrary. The Court did not

B. Applying Civil Rules 8(c) And 12(b) To Bar District Courts From Giving Effect To Limitations On Habeas Review Would Be Inconsistent With Habeas Principles

Application of Civil Rules 8(c) and 12(b) to habeas proceedings in the manner envisioned by petitioner would be "inconsistent * * * in the overall framework of habeas corpus." Rule 11 of the Section 2254 Rules, Advisory Committee Notes (1976). As previously discussed, see pp. 7-10, *supra*, because of the unique nature of habeas review, and the way in which it implicates principles of federalism, comity, and finality, Congress has assigned to the courts a distinctive role in enforcing appropriate limits on collateral review. Indeed, petitioner recognizes (Br. 13) there is no equivalent under the Civil Rules to the district court's responsibility as gatekeeper under 28 U.S.C. 2243 and Rule 4 of the Section 2254 Rules to dismiss *sua sponte* unmeritorious habeas petitions. While petitioner concedes (Br. 20) that Rules 8(c) and 12(b) of the Civil Rules must give way to the extent of an affirmative conflict with Rule 4, he maintains that Rules 8(c) and 12(b) apply to preclude any *sua sponte* action by the district court beyond

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discuss in either case what happens when there is tension between the Civil Rules and habeas principles. Indeed, in *Slack*, the Court emphasized the fact that the Civil Rules "vest the federal courts with due flexibility to prevent vexatious litigation," such as if a habeas petitioner injected undue delay by repeatedly bringing petitions with mixed exhausted and unexhausted claims. 529 U.S. at 489. That is entirely consistent with the authority exercised by the lower court here.

Nor do *Gonzalez* v. *Crosby*, 125 S. Ct. 2641 (2005), cited by petitioner at Br. 20 n.25, 32 & n.33, or *Lonchar* v. *Thomas*, 517 U.S. 314 (1996), relied on by petitioner at Br. 32-33, hold that application of the Civil Rules is to be measured solely against the text of the habeas statutes and rules. To the contrary, *Gonzalez* recognized that, in *Calderon*, the Court had rejected the Ninth Circuit's recall of its mandate as inconsistent with the federal rules and "the policies embodied in AEDPA," 125 S. Ct. at 2649, and in *Lonchar*, the Court rejected the district court's assertion of a "general 'equitable' power to create exceptions" to Rule 9(a) of the *Section 2254 Rules*, 517 U.S. at 316.

the explicit authority conferred by Rule 4 to dismiss petitions *sua sponte* before calling for a response by the State. But the "overall framework" of habeas cases posits a more active role for the courts, such that a court is not limited to the defenses asserted in the State's answer. There is, therefore, no general principle that a State's failure to raise an issue cuts off a habeas court's power to notice it.

1. Petitioner cites several of this Court's habeas decisions (Br. 15-16, 26) in support of the proposition that "affirmative defenses must be raised timely or else they are waived." *Id.* at 16. Notably, the purported "waiver" (or forfeiture) in those cases all concerned defenses that a State first raised, or the court first noticed, *after* proceedings in the district court had already been *completed* and the case was on appeal. See *Trest*, 522 U.S. at 89 (State had "neither raised nor argued" procedural default, even on appeal); *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (State raised non-retroactivity for the first time in its merits brief in the Supreme Court); *Collins* v. *Youngblood*, 497 U.S. 37, 40-41 (1990) (State had never asserted non-retroactivity defense and, when a member of this Court raised it *sua sponte* at oral argument, the State disclaimed reliance on it); *Granberry*, 481 U.S. at 135-136 (State interposed non-exhaustion for the first time on appeal). See also *Gray* v. *Netherland*, 518 U.S. 152, 165-166 (1996) (noting possibility of forfeiture with citation to *Schiro*, and *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980) (State "failed to raise [procedural default] in either the District Court or the Court of Appeals")); *Banks* v. *Dretke*, 540 U.S. 668, 705 (2004) (noting possibility of forfeiture, with reliance on *Gray* and *Granberry*).

None of the cases relied upon by petitioner even suggests that forfeiture in habeas cases is to be determined with exclusive reference to the State's answer, let alone holds that a court is barred from noting a habeas defense *sua sponte* in the absence of an answer asserting it. In fact, several of this Court's decisions are directly contrary to any such narrow

limitation on the courts' authority. See, *e.g.*, *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) ("a federal court may, but need not, decline to apply *Teague* if the State does not argue it"); *Schiro*, 510 U.S. at 229 (declining to address non-retroactivity defense that State raised only in Supreme Court merits brief, "[a]lthough we undoubtedly have the discretion to reach" the argument); *Granberry*, 481 U.S. at 134 (holding that State's failure, "whether inadvertently or otherwise," to raise nonexhaution in its answer did not preclude court of appeals from addressing it if "the interests of comity and federalism" warrant); *Jenkins*, 447 U.S. at 234 n.1 (exercising discretion not to address procedural default defense that State raised for the first time in the Supreme Court). Cf. *Trest*, 522 U.S. at 89-92 (holding there is no requirement that a court of appeals "*must* raise [procedural default] where the State itself does not do so," but declining to decide whether the court of appeals was permitted to raise the issue *sua sponte*); *Youngblood*, 497 U.S. at 41 (*Teague* non-retroactivity rule is not one the Supreme Court "*must* raise and decide * * * *sua sponte*" in light of State's affirmative representation that it "had chosen not to rely on *Teague*").

To the extent the Court's decisions suggest any general rule about when a State's defense to a habeas petition *might* be deemed forfeited, they emphasize the completion of district court proceedings, not the filing of the State's answer. See *Granberry*, 481 U.S. at 132 (noting reluctance to allow State "to withhold raising a defense until after the 'main event' —* * *, the proceeding in the District Court—is over"); *id.* at 135 ("if a full trial has been held in the district court * * *, it may * * * be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived"); *Banks*, 540 U.S. at 705 (quoting same); *Kontrick* v. *Ryan*, 540 U.S. 443, 458 (2004) (defendant forfeited untimeliness argument "by failing to raise the issue until after [the] complaint was adjudicated on the merits").

2. Petitioner also urges importing Civil Rules 8(c) and 12(b) based upon Rule 5(b) of the Section 2254 Rules, which requires the State to include certain defenses in its answer. Pet. Br. 30. Although petitioner concedes that the statute of limitations was not among the affirmative defenses listed in Rule 5 at the time of the State's answer in this case, petitioner urges that the later addition of that defense was not a substantive change, and that Rule 5 is "[f]unctionally * * * the same as the mandatory language in Civil Rules 8 and 12, which gives rise to the waiver principle of the Civil Rules." *Ibid.*

This Court's decision in *Granberry* demonstrates that Rule 5 is not dispositive of the question whether the district court has the power to raise a defense when the State fails to assert it in its answer. At the time of the *Granberry* decision, Rule 5 specified only one affirmative defense that the State was required to address in the answer: "whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state." See 481 U.S. at 132 n.5; Rule 5 of the Section 2254 Rules (1976). This Court observed that the rule imposed on the State "a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies." *Granberry*, 481 U.S. at 134. The Court nevertheless held that the court of appeals "is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. Rather, the appellate court should consider the interests of comity, federalism, and judicial efficiency, *id.* at 135, and decide "whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith," *id.* at 131. If an *appellate* court is free to reach a defense that was not asserted in the answer, then *a fortiori*, while a case is still pending in district court, that court is authorized to apply controlling legal principles despite the State's failure to comply with Rule 5. See *Caspari*, 510 U.S. at 389 (federal court

may apply non-retroactivity rule of *Teague*, though State does not argue it); *Schiro*, 510 U.S. at 228-229 (same). Cf. 28 U.S.C. 2243 para. 8 (district courts in habeas proceedings are empowered to "determine the facts, and dispose of the matter as law and justice require").

3. Petitioner's reliance on 28 U.S.C. 2254(b)(3) is similarly misplaced. Petitioner cites that provision, which provides that a "State shall not be deemed to have waived the exhaustion requirement * * * unless the State * * * expressly waives the requirement," *ibid.*, as support for the proposition that other defenses, as to which Congress has made no similar provision, are forfeited under more stringent rules that purportedly apply to civil cases generally. Pet. Br. 25. That statutory provision was not added to Section 2254 until AEDPA's enactment in 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1218, several years after this Court had already upheld, in *Granberry*, a court's authority to address an exhaustion defense despite the State's failure to raise it in its answer, 481 U.S. at 135. Thus, to the extent petitioner suggests that Section 2254(b)(3) supports the notion that strict forfeiture of defenses not timely raised in a habeas answer is the rule, absent an express statutory exception, *Granberry* refutes that suggestion.

Nor does Congress's adoption in Section 2254(b)(3) of an explicit rule with respect to waiver of the defense of exhaustion give rise to a negative inference that Congress intended to adopt a stricter rule of timely assertion or forfeiture with respect to other habeas defenses than the approach expressed in *Granberry*. There is no indication that, by establishing a *higher* threshold for inferring a State's waiver of the exhaustion requirement, Congress intended in AEDPA to make it *easier* for States to forfeit inadvertently the other limitations on habeas review. Rather, the amendment was specifically "designed to disapprove those decisions which have deemed states to have waived the exhaustion requirement, or barred them from relying on it, in circumstances other than where

the state has expressly waived the requirement." H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995). Thus, "[h]aving pinpointed the problem, [Congress] gave a pinpoint answer." *United States* v. *Vonn*, 535 U.S. 55, 71 (2002) (Congress's adoption of a harmless-error standard in Fed. R. Crim. P. 11(h) to respond to judicial holdings failing to conduct harmless-error review evinced no intent to displace plain-error review of forfeited claims).

4. Finally, strict enforcement of forfeiture principles derived from Rules 8(c) and 12(b) of the Civil Rules with respect to Section 2254 habeas petitions is inappropriate because it would introduce, based solely upon procedural technicalities, significant substantive disparities between habeas petitions under Section 2254 challenging state convictions and postconviction motions under Section 2255 to contest federal convictions. Although petitioner does not expressly state his rationale for urging application of Civil Rules 8(c) and 12(b) to Section 2254 proceedings, the implicit basis of his theory is that a habeas petition under Section 2254 is the equivalent of a civil complaint, and the State's response, if the court calls for one, is the equivalent of a defendant's answer. While that analogy is not entirely correct even with respect to Section 2254, it is even more inapt with respect to Section 2255.

Unlike a state prisoner seeking federal court review of his conviction, a federal prisoner does not initiate a new civil complaint in the district where he is incarcerated, but must file a motion under 28 U.S.C. 2255 in the district court that imposed his sentence. 28 U.S.C. 2255 para. 1. By the terms of the statute, a federal prisoner's filing is a motion to "set aside or correct the sentence," *ibid.*, which is a "further step in the movant's criminal case and not a separate civil action," Rule 1 of the Section 2255 Rules, Advisory Committee Notes (1976); *Frady*, 456 U.S. at 182 (Brennan, J., dissenting) (quoting S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948)). Thus, Section 2255, unlike Section 2243, does not specifically call for an answer to the prisoner's motion, and Rule 5 of the Section

2255 Rules does not mention any requirement of raising affirmative defenses.

Rather than looking to Civil Rules 8(c) and 12(b) to fill any gap in the Section 2255 Rules, a court would likely look to practice regarding untimely motions to challenge a conviction or sentence under Rule 33 or Rule 35 of the Federal Rules of Criminal Procedure or a similar motion to amend a judgment under Federal Rule of Civil Procedure 60(b). Although the Court recently held, in *Eberhart* v. *United States*, 126 S. Ct. 403 (2005) (per curiam), that Rule 33's time limitation for filing a postconviction motion is "nonjurisdictional," *id.* at 405, such that it need not be noticed for the first time by an appellate court, *id.* at 407, the Court did not question that the district court itself, had it noticed the untimeliness, would have had authority to give effect to the time limitation before ruling on the Rule 33 motion, despite the government's failure to raise the defect. The same power exists for a district court to enforce *sua sponte* the AEDPA statute of limitations in a Section 2255 proceeding.

It would be anomalous for a significant difference between postconviction review of state and federal convictions to turn on technical distinctions in the procedural description of the two proceedings. Rather, in both contexts, the unique role of the postconviction court justifies judicial initiative in enforcing procedural limitations.

III. ALLOWING THE DISTRICT COURT TO RAISE THE STATUTE OF LIMITATIONS *SUA SPONTE*, EVEN AFTER AN ANSWER HAS BEEN FILED, DOES NOT CONFLICT WITH GENERAL PRACTICE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Although Civil Rules 8(c) and 12(b) would be rendered inapplicable to habeas proceedings by habeas Rule 11 as "inconsistent * * * [with] the overall framework of habeas corpus," Rule 11 of the Section 2254 Rules, Advisory Committee Notes (1976), if they were as strict as petitioner maintains,

they are not in fact so limiting. Permitting the district court to raise AEDPA's statute of limitation *sua sponte* is not inconsistent with general principles of civil procedure.

Contrary to the implication of petitioner's arguments, a court with subject matter jurisdiction always has authority to apply the governing law. See *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (an appellate court "is not limited to the particular legal theories advanced by the parties but rather retains the independent power to identify and apply the proper construction of governing law"); *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990) (addressing a legal question that the parties had not argued).

Although, in ordinary civil cases, affirmative defenses generally must be raised in a first responsive pleading, see Fed. R. Civ. P. 8(c), "a defense may be raised in a number of ways even if the defense is not presented in the initial response." 2 James W. Moore, *Moore's Federal Practice* § 8.07[3], at 8-38 (3d ed. 2005). Under Rule 15(a) of the Federal Rules of Civil Procedure, leave of court to amend an answer "shall be freely given when justice so requires." See *Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (in the absence of "undue delay, bad faith or dilatory motive," "repeated failure to cure deficiencies," "undue prejudice to the opposing party," or "futility of amendment," "the leave sought should, as the rules require, be 'freely given'"); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 684-685 (3d ed. 2004). Because "[t]he purpose of [Rule 8(c)] is to give the opposing party notice of the [defense]" and a chance to rebut it, *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 350 (1971), the courts of appeals have routinely upheld a district court's discretion to allow a late amendment, in the absence of prejudice to the opposing party or bad faith, to add affirmative defenses, including a statute of limitations defense. *E.g.*, *Williams* v. *Lampe*, 399 F.3d 867, 871 (7th Cir. 2005); *Commander Oil Corp.* v. *Barlo Equip. Corp.*, 215 F.3d 321, 333 (2d Cir.) (upholding discretion to

allow amendment despite defendant's "seven-year delay to add its statute of limitations defense"), cert. denied, 531 U.S. 979 (2000); *Zotos* v. *Lindbergh Sch. Dist.*, 121 F.3d 356, 360 (8th Cir. 1997); *Phelps* v. *McClellan*, 30 F.3d 658, 662 (6th Cir. 1994). Likewise, the habeas statute expressly provides that "[t]he return * * * may be amended, by leave of court, before or after being filed." 28 U.S.C. 2243 para. 7.

In addition to formal amendment, in ordinary civil practice, affirmative defenses may be raised for the first time by the district court *sua sponte* when it is done in a fashion that does not result in unfair surprise or prejudice to the plaintiff. See Moore, *supra*, § 8:07[2] and [3], at 8-36 to 8-41; *Grand Rapids Plastics, Inc.* v. *Lakian*, 188 F.3d 401, 407 (6th Cir. 1999) (*sua sponte* dismissal on statute of limitations grounds), cert. denied, 529 U.S. 1037 (2000); *Mowbray* v. *Cameron County*, 274 F.3d 269, 281 (5th Cir. 2001) (res judicata), cert. denied, 535 U.S. 1035 (2002); *Salahuddin* v. *Jones*, 992 F.2d 447 (2d Cir.) (same), cert. denied, 510 U.S. 992 (1993). Although petitioner urges the Court (Br. 30-31) to treat the State's failure to amend its pleading under Rule 15(a) as dispositive, no purpose would be served by insisting on that formality, especially in a context in which the courts concededly have express authority to dismiss *sua sponte* before an answer is filed. See *Bendolph*, 409 F.3d at 166 n.16 (a "federal habeas court acting *sua sponte* need not invite the government to amend an answer pursuant to Rule 15(a)"). Cf. *Moore* v. *McDonald*, 30 F.3d 616, 618 (5th Cir. 1994) (upholding *sua sponte* dismissal of *in forma pauperis* complaint as frivolous on statute of limitations grounds, citing 28 U.S.C. 1915(d) (1988)); *Street* v. *Vose*, 936 F.2d 38, 39 (1st Cir. 1991) (per curiam) (Breyer, C.J., presiding) (same), cert. denied, 502 U.S. 1063 (1992); *Ali* v. *Higgs*, 892 F.2d 438 (5th Cir. 1990) (citing 28 U.S.C. 1915(d) (1988), court of appeals dismissed complaint on statute of limitations grounds not raised or decided in district court). Moreover, any district judge who wished to enforce a limitations period that the State had not

raised would have to do no more than to invite a motion to amend the pleadings to raise the defense. Cf. *Carlisle* v. *United States*, 517 U.S. 416, 423-424 n.3 (1996) (same observation with respect to a motion for judgment of acquittal under Fed. R. Crim. P. 29(c)). The Court should not require such empty formalism.[11]

IV. A DISTRICT COURT SHOULD *SUA SPONTE* DISMISS A HABEAS PETITION AS UNTIMELY ABSENT ACTUAL PREJUDICE OR WASTE OF JUDICIAL RESOURCES

Of course, just because a court has the *authority* to raise a procedural bar *sua sponte* after the State has filed its answer does not mean that it should do so in every case. As the Third Circuit explained in *Bendolph*, *sua sponte* action by the district court after the government has responded should give the petitioner "notice of the issue and an opportunity to respond," and must "analyze[] the prejudice components of Rule 15(a)" to determine whether the petitioner would be prejudiced by the State's failure to assert the defense earlier. 409 F.3d at 169. Cf. *Castro* v. *United States*, 540 U.S. 375, 383 (2003) (recognizing court's *sua sponte* authority to rechar-

[11] Petitioner cites several cases for the proposition that "courts lack the authority to apply a waived limtations defense *sua sponte* in an ordinary civil case." Pet. Br. 13 & n.17. Those cases, from the Second, Fifth, Sixth, and Seventh Circuits, do not stand for any absolute rule that an unasserted affirmative defense cannot be raised by the court, as is clear from the cases cited in the text from those same circuits that *allow* the district courts to raise *sua sponte* such defenses in certain circumstances. Moreover, while the courts of appeals plainly frown on *sua sponte* dismissals that give the plaintiff no warning or opportunity to respond, see, *e.g.*, *Davis* v. *Bryc*[illegible], 810 F.2d 42, 44 (2d Cir. 1987) (*sua sponte* raising and deciding statute of limitations issue without notice to parties), or that come after the expenditure of considerable resources, *Haskell* v. *Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) (three years of litigation and three published decisions), it is evident, from the cases cited in the previous paragraph, that those circuits do permit the raising of a statute of limitations post-answer by way of an amended answer. As indicated in the text, there is no reason to insist on that formality in this context.

acterize *pro se* litigant's motion as a first Section 2255 motion if it first provides notice and an opportunity to withdraw the motion). In some circumstances, such as after an extensive evidentiary hearing has already been held, the court might conclude that belatedly raising the statute of limitations would be inconsistent with the principles and policies that underlie the defense. Cf. *Haskell* v. *Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) (reversing order allowing amendment of answer to add statute of limitations defense "[b]ecause of the length of time (over three years) and extensive litigation (three published decisions) between the filing of this action and the district court's *sua sponte* raising of the issue").

None of those concerns is present here. There is no claim that petitioner was prejudiced by the State's erroneous statement in its answer that the petition was timely. Nor is this the case of a State that made an affirmative determination "not to interpose [AEDPA's] limitation defense" for one or another reason. Pet. Br. 37. Cf. *Youngblood*, 497 U.S. at 40-41 (State affirmatively disavowed reliance on *Teague*). This is a case of forfeiture, not waiver. See note 2, *supra*. Here, the State's answer clearly did not "waive" the statute of limitations defense, in the sense of an "intentional relinquishment or abandonment of a known right." *Kontrick*, 540 U.S. at 458 n.13 (citation omitted). The State did not, for example, respond that the petition, though filed after AEDPA's one-year period, would be answered only on the merits. Rather, it is evident from the State's reference to "352 days of untolled time" having elapsed, J.A. 24, that the State was under the mistaken belief that the one-year limitations period had not run, a fact that is further demonstrated by the State's subsequent embrace of the untimeliness defense.

Nor did the omission of the defense in the State's answer result in unnecessary expenditure of effort and resources. The magistrate judge's order to show cause concerning the petition's untimeliness was the first thing that the magistrate

judge did in the case following receipt, in connection with the State's answer, of the court documents that were necessary to determine the date on which petitioner's state collateral appeal was no longer pending and the tolling of the habeas statute of limitations ceased. Thus, contrary to petitioner's contention (Br. 11), the district court's *sua sponte* dismissal undeniably furthered, rather than undermined, the goal of "quickly identify[ing] successful defenses and terminat[ing] the proceedings, saving time and expense for itself and the parties."

Accordingly, the court of appeals' conclusion that the district court retains its authority to raise *sua sponte* the issue of the statute of limitations in a habeas proceeding is consistent with a proper understanding of Civil Rules 8(c), 12(b), and 15(a), and it gives full effect to the important societal concerns at stake in habeas proceedings, as well as to the intent of Congress in enacting AEDPA's strict one-year time limit. See *Mayle*, 125 S. Ct. at 2575. Neither prejudice nor judicial efficiency concerns prevented the district court from exercising that power here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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